Laborers' International Union of North America, AFL–CIO Local 210 *and* International Union of Operating Engineers, Local Union No. 17, AFL–CIO *and* Concrete Cutting & Breaking, Inc.
Case 3–CD–628–1 and Case 3–CD–628–2

August 31, 1999

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FOX, LIEBMAN, AND BRAME

The charge in this Section 10(k) proceeding was filed August 22, 1996,[1] by the Employer, alleging that the Respondent Unions, Laborers' International Union of North America, AFL–CIO, Local 210 (Laborers) and International Union of Operating Engineers of America, Local 17 (Operating Engineers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees each represents rather than to employees represented by the other Union. The hearing was held September 11–13, 1996, before Hearing Officer Paul J. Murphy. Thereafter, the Employer and the Operating Engineers filed briefs; the Laborers joined in the Employer's brief, except to the extent it argues that the Laborers acted unlawfully.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, Concrete Cutting & Breaking, Inc., is a New York corporation engaged in the business of concrete cutting. Annually, during the course and conduct of its business, it purchases and receives at its Buffalo facility goods valued in excess of $50,000 directly from places outside the State of New York. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act and that Laborers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer commenced its operations in the Buffalo area in January 1992. It immediately signed an agreement with the Laborers, and each employee whom it has hired to operate its concrete saws since that time has been represented by the Laborers. In October 1993, the Employer also signed an agreement with the Operating Engineers. It did not renew this agreement when it expired in the spring of 1996. The Employer has never employed an employee represented by the Operating Engineers to operate its concrete saws.

On August 9, Gary Pritchard, a steward for and an executive board member of the Operating Engineers, approached an employee of the Employer, Chris Navel, who was represented by the Laborers and was operating a concrete saw at a jobsite, and told him that "you are not going to do that any more. We're going to stop you from running that saw. That's a self-propelled concrete saw and only operators can run it. We're going to stop you all over the state." On that same day Pritchard, in the presence of a representative from the firm that had contracted for the disputed work, again insisted that Navel could not run the saw because the work belonged to the Operating Engineers. Pritchard also told Moore, the Employer's general manager, that the Operating Engineers would be "stopping you on every jobsite in western New York."

During the same period, the Employer was apparently discussing a resolution of this dispute with a representative of the Operating Engineers. On August 19, in apparent response to these discussions, Garbriel Rosetti, the appointed supervisor of the Laborers, wrote the Employer a letter in which he asserted the Laborers' claim to the work, and indicated that the Laborers intended to withdraw the services of the employees it represented on August 22, in support of its jurisdictional claim concerning the operation of self-propelled concrete saws. On August 22, all nine saw operators employed by the Employer, all of whom were represented by the Laborers, engaged in a 1-day strike.

B. Work in Dispute

The disputed work involves the operation of self-propelled concrete slab or flat saws, self-propelled concrete curb cutting saws, and concrete self-propelled wall cutting saws at various jobsites in New York State.

C. Contentions of the Parties

The Employer contends that reasonable cause exists to believe that both the Operating Engineers and the Laborers violated Section 8(b)(4)(D) of the Act, the Operating Engineers through Pritchard's statements that employee Navel could not perform the work in dispute, and the Laborers through Rosetti's statement that the Union would withdraw the services of the employees it represented in support of its jurisdictional claim and the 1-day strike by the nine saw operators it represented.

The Employer and the Laborers contend that the disputed work should be awarded to employees represented by the Laborers based on the factors of employer preference, economy and efficiency of operations, collective-bargaining agreements, relative skills, and area and industry practice.

The Operating Engineers contends that its 1993–1996 collective-bargaining agreement with the Employer gives it jurisdiction to operate "self-propelled concrete saw

[1] All dates are 1996, unless stated otherwise.

and/or cutters," and that, in contrast, the Employer's collective-bargaining agreement with Laborers International Union contains merely general language that does not specifically describe the equipment covered by the contract. Therefore, the Operating Engineers argues that the work should be awarded to employees it represents.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(K) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a voluntary adjustment of the dispute.

As noted above, it is undisputed that Operating Engineers steward Pritchard made claims to the work of running the curb saw in the presence of employee Navel, a representative of the firm that contracted with the Employer for the work, and the Employer's office manager and it is also undisputed that Pritchard voiced a threat to Navel and to the Employer's office manager that the Operating Engineers would shut down the work on every one of the Employer's jobsites in Western New York. We find reasonable cause to believe that an object of Pritchard's threats was to force the Employer to assign the disputed work to employees represented by the Operating Engineers. Also, it is undisputed that Rosetti, the Laborers' supervisor, stated that the Laborers would withdraw the services of employees it represented in support of its claim to the work, and that all saw operators, who were represented by the Laborers, engaged in a 1-day strike over the assignment of the work. We find reasonable cause to believe that an object of Rosetti's statements and of the strike was to force the Employer to continue to assign the disputed work to employees represented by the Laborers.

Thus, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) of the Act has occurred. No party contends that there exists an agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of the disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting),* 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction),* 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

Neither Union is the certified bargaining representative of a unit of the Employer's employees. The Employer had a collective-bargaining agreement with the Operating Engineers which expired, without renewal, on March 31, 1996, prior to the August 1996 events giving rise to the proceeding. This agreement stated that self-propelling concrete saws and cutters are within the Operating Engineers' jurisdiction. The Employer had a collective-bargaining agreement with the Laborers' International Union during the period in question, which provides in article 1—Scope (Coverage), section A: "This Agreement shall cover all concrete coring, drilling and sawing for any purpose in the area of the United States and its territories." The Employer also was a party to a collective-bargaining agreement with the Laborers Local 210 during the period in question, which provides in pertinent part in article XVIII, Status quo on certain equipment, that:

> The parties hereto recognize that the operation of certain equipment and work assignments may raise questions regarding jurisdiction of work in areas of the local unions party to this Agreement. The equipment involved is:
>
> . . . .
>
> (h). Self-Propelled Concrete Saw
>
> Pending final determination of the jurisdiction of the above equipment, such equipment and the operation thereof shall remain "status-quo."

We find that the factor of the collective-bargaining agreements favors an award of the work in dispute to employees represented by the Laborers. See *Stage Employees IATSE Local 41 (Greyhound Exhibit Group),* 270 NLRB 369, 370 (1984) ("[W]here there are two collective-bargaining agreements both of which arguably cover disputed work, and one is in effect while the other had expired, the Board has found that this factor favors an award of the work to employees represented by the union which has the currently effective agreement with the Employer.")

2. Employer preference and past practice

The preference of the Employer is to use employees represented by the Laborers to perform the disputed work. Its past practice has been to use employees represented by the Laborers to operate all self-propelled saws on all its jobsites since it began operations in New York State. Therefore, the factors of employer preference and past practice favor an award of the disputed work to employees represented by the Laborers.

3. Area practice

The Employer performs more concrete cutting work with curb, flat, slab, and wall saws than any other contractor in the Western New York State area. It is the contractor or subcontractor for such work on most of the

concrete cutting work in the area. As noted above, the Employer has consistently assigned the disputed work to employees represented by the Laborers. Therefore, the factor of area practice supports an award of the disputed work to employees represented by the Laborers.

4. Relative Skills

Both the employees represented by the Operating Engineers and those represented by the Laborers possess the skills to operate the various types of self-propelled concrete saws used by the Employer. However, it is undisputed that the Employer has previously trained employees represented by the Laborers to operate the curb saw. Initial training takes 4 weeks; attaining maximum proficiency takes a year. The record does not show that employees represented by the Operating Engineers have had such training. Thus, the factor of relative skills favors an award of the disputed work to employees represented by the Laborers.

5. Economy and efficiency of operations

The work in dispute involves a multi-stage operation. Initially, debris is cleared away and the concrete cutting and grinding operation is set up, followed by the actual operation of the self-propelled curb, slab, or wall concrete saw. The Operating Engineers has not claimed the cleanup or grinding phases of the operation, which employees represented by the Laborers perform. Accordingly, an award of the disputed work to employees represented by the Laborers permits performance of the entire operation from clean up and grinding to running the self-propelled saw by the same group of employees. Thus, the factors of economy and efficiency of operations favor an award of the disputed work to employees represented by the Laborers.

Conclusion

After considering all the relevant factors, we conclude that the work in dispute should be awarded to the Employer's employees represented by the Laborers. We reach this conclusion relying on the factors of the collective-bargaining agreements; employer preference and past practice; area practice; relative skills; and economy and efficiency of operations. In making this determination, we are awarding the work in dispute to the Employer's employees represented by the Laborers, not to that Union or its members.

Scope of the Award

The Employer contends that, based on the actions of the Laborers and the Operating Engineers, a broad award is necessary to avoid similar jurisdictional disputes in the future, and that the determination should encompass the entire geographical jurisdiction of the Operating Engineers.

The Board has customarily declined to grant an areawide award in cases such as this in which a charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. *Laborers (Paul H. Schwendener, Inc.),* 304 NLRB 623, 625 (1991). Accordingly, the conduct of the Laborers does not in itself warrant a broad order. Further, for the Board to issue a broad areawide award, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area and that similar disputes are likely to recur. There must also be evidence that demonstrates that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. *Electrical Workers IBEW Local 211 (Sammons Communications*), 287 NLRB 930, 934 (1987). The record contains some evidence that the Operating Engineers may have claimed similar work on other projects and/or made threats concerning similar projects. However, we are not persuaded that the requisite showing has been made on this record that similar disputes are likely to arise in the future or that the Operating Engineers has a proclivity to engage in unlawful conduct to obtain similar work. We further note that there are no prior Board determinations involving disputes between these parties. Accordingly, in the circumstances here, we find a broad order is not warranted. Therefore, the present determination is limited to the particular controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Concrete Cutting & Breaking, Inc., who are represented by Laborers' International Union of North America, AFL–CIO, Local 210, are entitled to perform the work of the operation of self-propelled concrete slab or flat saws, self-propelled concrete curb cutting saws, and self-propelled concrete wall cutting saws used by the Employer on various jobsites in New York State.

2. International Union of Operating Engineers, Local 17, AFL–CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Concrete Cutting & Breaking, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, International Union of Operating Engineers, Local 17, AFL–CIO shall notify the Regional Director for Region 3, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with this determination.